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HJ SALLEH HJ JANAN

v.

FINANCIAL INFORMATION SERVICES SDN BHD

B

COURT OF APPEAL, PUTRAJAYA
ABU SAMAH NORDIN JCA
HISHAMUDIN MOHD YUNUS JCA
SYED AHMAD HELMY JCA
[CIVIL APPEAL NO: S-02-1354-2004]

C

23 MAY 2011

TORT: *Defamation - Libel in enquiry reports - Reports provided by respondent credit agency to financial institutions on appellant's credit and financial standing - Reports stating appellant still a bankrupt when in*

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fact he was discharged as a bankrupt - Whether reports defamatory of appellant - Whether defence of justification available - Whether respondent duty bound to provide correct and complete information - Whether High Court erred in dismissing appellant's claim for damages for libel

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In the High Court the appellant as plaintiff brought a claim for damages for libel against the respondent as defendant. The appellant claimed that the respondent published defamatory enquiry reports about him to two financial institutions on his credit and financial standing. It was not disputed that the appellant was

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adjudged a bankrupt in 1981 and 1991 and discharged as a bankrupt in 1995 and 1997. The appellant alleged that the enquiry reports which contained the information on his adjudication as a bankrupt in 1981 and 1991 omitted the information on his discharge as a bankrupt in 1995 and 1997. That led to the

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impression that he was still a bankrupt as at the date the enquiry reports were published on 13 March 2000. As a result thereof, his loan applications were rejected by the two financial institutions. The respondent availed itself of the defence of justification. The High Court found that the respondent succeeded in establishing

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the defence of justification and dismissed the appellant's claim. The appellant now appealed.

Held (allowing the appeal):
Per Hishamudin Mohd Yunus JCA delivering the judgment of the court:

I

(1) The contents of the enquiry reports stipulating that the appellant was still a bankrupt when in fact he was discharged as a bankrupt by the publication date of the reports were

defamatory of the appellant. The law was clear that it was defamatory to allege someone a bankrupt when that person was not one. (para 17)

(2) The defence of justification was not accepted. Although it was true that the appellant was adjudged a bankrupt in 1981 and in 1991, the appellant, on the publication date of the enquiry reports on 13 March 2000, was no longer a bankrupt. The respondent failed to point out his discharge as a bankrupt in the enquiry reports. In fact, the respondent was ignorant of the appellant's discharge in 1995 and 1997 and had in fact, when the appellant protested, unfairly asked the appellant to furnish documentary evidence of his discharge as a bankrupt. (para 21)

(3) By reason of the material omission that the appellant was discharged as a bankrupt, the enquiry reports gave a reasonable person reading them the impression that the bankruptcies were still in force. Such an impression was highly probable by the fact that the enquiry reports had a section on "Discharge" which meant that any particulars of a discharge of bankruptcy must be furnished. However, that section was left blank. Therefore, any normal person reading the reports would reasonably assume that the appellant was still a bankrupt on the publication date of the reports. The reasonable person would also reasonably assume that the respondent would have filled in that section if the appellant had been discharged as a bankrupt. (para 21)

(4) The respondent was a credit agency which acted for reward. The information given to a subscriber by such an agency was not privilege *(Gatley on Libel and Slander)*. In any case, the respondent had not acted *bona fide*. The appellant was discharged twice as a bankrupt and since 1997 was no longer one. The respondent did not take the simple but necessary effort of finding out from the office of the Director General of Insolvency the current and actual status of the appellant. Instead it allowed its own enquiry reports to remain incomplete. Its reports contained half-truths. Hence, there was an element of dishonesty and malice in the reports. Further, the respondent imposed a fee on the information supplied and was making profits from the business of collating and supplying information to members of the associations. The principle

propounded by Lord Parker in *London Association for Protection of Trade and Another v. Greenlands Ltd* was of no assistance to the respondent. (paras 24-27)

[Case remitted to High Court for determination on issue of damages; costs of RM20,000 (here and below) awarded to appellant.]

Bahasa Malaysia *Translation Of Headnotes*

Di Mahkamah Tinggi, perayu sebagai plaintif menuntut gantirugi terhadap responden sebagai defendan kerana memfitnah. Perayu mendakwa bahawa responden telah menyiarkan laporan siasatan mengenai dirinya yang bersifat memfitnah kepada dua institusi kewangan, iaitu mengenai kedudukan kewangan dan kreditnya. Tidak dinafikan bahawa perayu telah diisytiharkan bankrap pada tahun 1981 dan 1991 dan telah dilepaskan dari kebankrapan tersebut pada tahun 1995 dan 1997. Perayu mendakwa bahawa laporan siasatan yang mengandungi maklumat mengenai pengadjudikasi beliau sebagai orang bankrap pada tahun 1981 dan 1991, telah gagal menyiarkan sekali mengenai pelepasannya dari kebankrapan tersebut pada tahun 1995 dan 1997. Kegagalan tersebut, menurut perayu, memberi gambaran bahawa beliau masih lagi seorang bankrap semasa laporan siasatan tersebut disiarkan pada 13 Mac 2000. Juga, sebagai akibatnya, permohonan pinjaman beliau kepada kedua-dua institusi tersebut telah ditolak. Responden berselindung di bawah pembelaan justifikasi. Mahkamah Tinggi mendapati responden berjaya dalam pembelaannya dan sekaligus menolak tuntutan perayu. Perayu telah merayu.

Diputuskan (membenarkan rayuan):
Oleh Hishamudin Mohd Yunus HMR menyampaikan penghakiman mahkamah:

(1) Kandungan laporan siasatan yang menyatakan bahawa perayu masih seorang bankrap sedangkan beliau sudahpun dilepaskan dari kebankrapan pada tarikh laporan tersebut disiarkan adalah bersifat fitnah terhadap perayu. Undang-undang adalah jelas bahawa adalah suatu fitnah untuk mengatakan seseorang itu bankrap jika pada hakikatnya beliau bukan seorang bankrap.

(2) Pembelaan justifikasi tidak boleh diterima. Walaupun ianya benar bahawa perayu telah diisytiharkan bankrap pada tahun 1981 dan 1991, perayu, setakat tarikh penyiaran laporan siasatan pada 13 Mac 2000, sudah tidak lagi seorang bankrap. Responden telah gagal menyiarkan pelepasan beliau dari

kebankrapan dalam laporan siasatan mereka. Responden sebenarnya tidak menyedari langsung tentang pelepasan perayu dari kebankrapan pada tahun 1995 dan 1997, dan malah secara tidak adil telah meminta perayu supaya menunjukkan keterangan dokumentari mengenai pelepasannya dari kebankrapan.

(3) Disebabkan oleh ketinggalan material untuk menyatakan pelepasan perayu sebagai seorang bankrap, seorang yang munasabah yang membaca laporan siasatan akan mendapat gambaran bahawa kebankrapan masih lagi berkuatkuasa. Gambaran sedemikian adalah amat mungkin memandangkan wujudnya bahagian berkaitan "Pelepasan" dalam laporan siasatan, yang bermaksud bahawa sebarang butiran mengenai pelepasan si bankrap hendaklah juga disiarkan. Bahagian tersebut bagaimanapun telah ditinggalkan kosong. Oleh itu, mana-mana orang biasa yang membaca laporan akan semestinya menganggap bahawa perayu adalah dan masih seorang bankrap setakat tarikh laporan siasatan tersebut. Orang munasabah juga akan secara munasabahnya menganggap bahawa responden tentunya akan mengisi bahagian tersebut sekiranya perayu telah dilepaskan dari kebankrapan.

(4) Responden adalah sebuah agensi kredit yang bertindak untuk keuntungan. Maklumat yang diberikan kepada pelanggan oleh agensi sedemikian bukan merupakan maklumat dilindungi *(Gatley on Libel and Slander)*. Walau apapun, responden tidak bertindak secara *bona fide*. Perayu telah dilepaskan dari kebankrapan sebanyak dua kali, dan sejak 1997 sudah tidak lagi menjadi orang bankrap. Responden tidak mengambil langkah mudah dan perlu untuk mengesahkan dari pejabat Ketua Pengarah Insolvensi mengenai kedudukan terakhir dan sebenar perayu. Sebaliknya, ia membiarkan laporan siasatannya terus berada dalam keadaan tidak tepat. Sebahagian dari laporannya adalah tidak benar. Oleh itu, laporan dikotori oleh elemen tidak jujur dan niat jahat. Selain itu, responden mengenakan bayaran atas maklumat yang dibekalkan, dan membuat keuntungan dari perniagaan mengumpul dan membekalkan maklumat kepada ahli-ahli persatuan. Prinsip sepertimana yang dikatakan oleh Lord Parker di dalam *London Association for Protection of Trade and Another v. Greenlands Ltd* tidak dapat membantu responden.

[Kes dikembalikan ke Mahkamah Tinggi untuk pemutusan isu gantirugi; kos RM20,000 (di sini dan di bawah) diawardkan kepada perayu.]

Case(s) referred to:
London Association for Protection of Trade and Another v. Greenlands Limited [1916] 2 AC 15 ***(refd)***

Other source(s) referred to:
Gatley on Libel Slander, 11th edn, pp 66, 465, paras 2.21, 14.27

For the appellant/plaintiff - Edwin Tsen; M/s Tan Pang Tsen & Co
For the respondent/defendant - Chen Kok On; M/s Peter Lo & Co

[Appeal from High Court, Sandakan; Civil Suit No: S22-05-2001]

Reported by Usha Thiagarajah

JUDGMENT

Hishamudin Mohd Yunus JCA:

[1] This is an appeal against the decision of the High Court of Sabah and Sarawak at Sandakan.

[2] On 18 November 2004 the High Court at Sandakan had dismissed the appellant's claim for damages against the respondent for libel.

[3] We have unanimously allowed the appeal. We now give our grounds.

[4] In this judgment, we shall be referring to the appellant as 'the plaintiff' and to the respondent as 'the defendant'.

[5] At the High Court, the learned Judicial Commissioner, in his judgment, made a finding that enquiry reports published by the defendant to two financial institutions were, on the face of it, defamatory of the plaintiff; but, nevertheless, at the conclusion of the trial, dismissed the plaintiff's claim on the grounds that the defendant had succeeded in establishing the defence of justification.

[6] Aggrieved by the decision, the plaintiff now appeals to this court.

Facts Of The Case

[7] The plaintiff is a businessman. He had been adjudged a bankrupt by the court twice: the first time was in 1981, and the second occasion was in 1991. But the first bankruptcy order was rescinded and annulled in 1995, whilst the second bankruptcy order was rescinded and annulled in 1997.

[8] The defendant is a company incorporated by two associations of financial institutions: the Association of Finance Companies of Malaysia and the Association of Hire-Purchase Companies of Malaysia. The business of the defendant is to provide information, upon request and on the payment of a fee, to members of the two associations on the credit and financial standing of persons specified by the member requesting, and whose particulars on credit and financial standing are in the database of the defendant.

[9] The plaintiff had applied for a loan for the purpose of his business from two financial institutions, namely, Affin Finance Berhad (now known as Affin ACF Finance Berhad) and Arab-Malaysian Finance Berhad.

[10] He was unsuccessful in his applications.

[11] Now, unbeknown to the plaintiff, the defendant, on 13 March 2000, had supplied the said two financial institutions with enquiry reports containing information that the plaintiff had been adjudged a bankrupt by the court in 1981 and 1991. The enquiry reports referred to the relevant Government Gazettes and the relevant newspaper reports in the Daily Express, Sabah, which had provided information on the plaintiff's bankruptcy orders. The enquiry reports, however, and this is significant, did not clarify that the plaintiff had been discharged as a bankrupt in 1995 and 1997. On the contrary, the enquiry reports give the impression that as at the date of the reports (13 March 2000) the plaintiff was still an undischarged bankrupt.

[12] The act of the defendant in supplying the information on the plaintiff's bankruptcy status, *via* their enquiry reports, to the two financial institutions subsequently came to the knowledge of the plaintiff. He was angry and upset as the information supplied by the defendant to the two financial institutions – that he was a

A bankrupt – was not true; for he had ceased to be a bankrupt since 1997. He suspected that this false information must have been the reason why his loan applications were rejected by the two financial institutions.

B **[13]** He immediately instructed his solicitors to write to the defendant to inform the latter that he was no longer a bankrupt and demanded compensation. His solicitors did so as instructed, by their letter to the defendant dated 30 March 2000.

C **[14]** The defendant did not offer any compensation: neither did it apologize for the error in their enquiry reports. Instead, the defendant responded (by its letter of 3 April 2000) by asking the plaintiff to furnish it with the court orders that had rescinded and annulled the two bankruptcy orders.

D **[15]** On 15 December 2000 the plaintiff's solicitors wrote again to the defendant demanding compensation. The defendant still did not accede to the plaintiff's demand.

[16] Thereafter, the plaintiff sued the defendant for libel.

E

Are The Enquiry Reports Defamatory Of The Plaintiff?

[17] In this appeal, the first issue is whether the contents of the enquiry reports supplied by the defendant to the two financial institutions are defamatory of the plaintiff. In our judgment, we F agree with the learned Judicial Commissioner that the contents of the enquiry reports published by the defendant to the effect that the plaintiff was a bankrupt – when he was not – were defamatory. The law is clear that it is defamatory to allege someone to be a bankrupt when that person is not. In *Gatley on* G *Libel Slander* (11th edn, p. 66 para 2.21) it is said:

> … it is defamatory to say that any person (whether or not he is a trader or in business and including a corporation) is insolvent, or cannot or will not pay his debts, …

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Is The Defendant Entitled To The Defence Of Justification?

[18] Before the High Court it was the contention of the defendant that it was entitled to the defence of justification. As we have said earlier, that defence of justification was accepted by I the learned Judicial Commissioner. Learned counsel for the defendant makes the same submission before us.

[19] On this issue, we disagree with the learned Judicial Commissioner. A

[20] The defendant attempts to justify the publication of the enquiry reports to the two financial institutions by asserting that what it did was merely to state a true fact: that the plaintiff had been adjudged a bankrupt in 1981 and in 1991. It is submitted by the defendant that what it did was nothing more than merely referring to the relevant Government Gazettes and the relevant newspaper reports that contained the particulars of the bankruptcy orders. B C

[21] With respect, we are unable to accept the contention that the publication is justified. It is true that it is not disputed that the plaintiff had been adjudged a bankrupt in 1981 and in 1991. However, the plaintiff, on the date of the publication of the enquiry reports on 13 March 2000, was no longer a bankrupt: he had been discharged as a bankrupt in 1995 and in 1997. Yet, significantly, the defendant failed to point out in the enquiry reports that the bankruptcies of the plaintiff had been discharged way back in 1995 and in 1997. In fact the defendant was ignorant of the fact that the plaintiff had been discharged as a bankrupt in 1995 and in 1997, and had in fact, when the plaintiff protested, unfairly asked the plaintiff to furnish them with documentary evidence that he had been discharged as a bankrupt. In our view, the enquiry reports, by reason of the material omission, give a reasonable person reading them the impression that the bankruptcies were still in force. That such an impression is highly probable is fortified by the fact that, although the enquiry reports do have a section that provides: D E F

> Discharge: G

meaning that the enquiry reports must furnish particulars of any discharge of bankruptcy, yet we note that this section is merely left blank. Thus, any normal person reading the reports would reasonably assume that the plaintiff was still a bankrupt on the date of the reports; for he also would reasonably assume that the defendant certainly would have filled in this section if, truly, the plaintiff had been discharged as a bankrupt. H

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Is The Defendant Entitled To The Defence Of Qualified Privilege?

[22] It is the further contention of the defendant that to share information about the creditworthiness of a person is privilege; citing *London Association for Protection of Trade and Another v. Greenlands Limited* [1916] 2 AC 15. In this House of Lords case, Lord Parker of Waddington expressed the following principle of (at p. 42):

> My Lords, having regard to the way in which business is carried on in this country, occasions must arise in which it is not only legitimate but necessary for one trader to inquire into the financial circumstances and credit of another. A person asked for information under such circumstances may be said to be under a social duty to communicate it, and it is in the interests of society generally that he should be able to do so without fear of an action for libel. It is therefore a principle of law that a person asked for information affecting the credit of another is justified in giving it, provided (1) that he *bona fide* believes in the truth of the information which he gives; (2) that he *bona fide* believes that the person making the inquiry has an interest which justifies it; and (3), if *Macintosh v. Dun* is to be considered good law, that he is actuated by motives of private gain or other motives, excluding the possibility of the communication being made under a sense of social duty. Under such circumstances the implication of malice arising out of a false statement to the discredit of another is displaced and the communication is privilege.

[23] The learned Judicial Commissioner, in his grounds of judgment, did not deal with this issue. He found it unnecessary to do so in the light of his finding on the issue of justification.

[24] With respect, on our part, we regard the defendant as nothing more than merely a credit agency which acted for reward. Hence we would adopt the following principle applicable to such an agency as stated by *Gatley on Libel and Slander* (at p. 465 para 14.27):

> Credit agencies. In *Macintosh v. Dun* it was held that where a mercantile agency or trade protection society carries on the business of collecting information as to the credit and financial standing of other persons and supplying such information for reward to any trader who may become a subscriber of the agency or society, the information given to a subscriber, though given *bona fide* and in answer to a confidential inquiry on his part, is not privilege, for, it was said, it is not in the interests of the community or the welfare of society that:

> the protection which the law throws around communications made in legitimate self-defence or from a *bona fide* sense of duty should be extended to communications made from motives of self-interest by persons who trade for profit in characters of other people.
>
> *Macintosh v. Dun* has been criticized and does not represent the predominant view of the law in the United States, but there does not seem any doubt that it represents English law where credit agencies which act for reward give information in the ordinary course of their business.

[25] We would like to add that in any case we do not think that the defendant in the present case had acted *bona fide*. The plaintiff had been discharged as a bankrupt twice and that since 1997 he was no longer a bankrupt. Yet, remarkably, the defendant did not take the simple but necessary effort of finding out from the office of the Director General of Insolvency the current and actual status of the plaintiff. Instead it had allowed its own enquiry reports to remain incomplete. In other words, its reports contain half-truths. Hence there is an element of dishonesty and malice in the reports.

[26] There are also the further facts that the defendant imposed a fee on the information that it supplied; and that it was making profits from the business of collating and supplying information to members of the associations.

[27] Therefore, even the principle as pronounced by Lord Parker in *London Association v. Greenlands* (cited above), on the facts of the case before us, is of no assistance to the defendant.

[28] We, therefore, remit this case back to the High Court for a determination on the issue of damages.

[29] We award costs of RM20,000 (for costs here and below) to the appellant.

[Appeal allowed with costs.]